

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERALD FREDERICK YOUNG,

Defendant-Appellant.

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UNPUBLISHED

May 11, 2010

No. 290264

Wayne Circuit Court

LC No. 08-005452-FC

Before: CAVANAGH, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM.

After a jury trial, defendant Gerald Frederick Young was convicted of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (person under 13), and one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (person under 13). He was sentenced to concurrent terms of 25 to 60 years' imprisonment for each CSC I conviction and to time served for the CSC II conviction. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that he is entitled to a new trial because the jury verdicts were against the great weight of the evidence. Defendant concedes that he did not preserve this issue by raising it in a motion for a new trial. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). Therefore, we review this issue for plain error affecting defendant's substantial rights. *Id.*; *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A new trial may be granted where a verdict is manifestly against the clear weight of the evidence, i.e., the evidence so clearly weighs in the defendant's favor that it would be a miscarriage of justice to allow the verdict to stand. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998); *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993). In considering a request for a new trial on this ground, a court must review the whole body of proofs. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993), overruled in part on other grounds by *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). Generally, a verdict may be vacated only when it is not reasonably supported by the evidence and was more likely the result of causes outside the record, such as passion, prejudice, sympathy, or some other extraneous influence. *DeLisle*, 202 Mich App at 661; *People v Plummer*, 229 Mich App 293, 306; 581 NW2d 753 (1998). "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *Lemmon*, 456 Mich at 643-644, 647. The resolution of credibility questions is within the exclusive province of the jury, *DeLisle*, 202 Mich

App at 662, and this Court may not resolve them anew, *Gadomski*, 232 Mich App at 28. “[U]nless it can be said that directly contradictory testimony was so far impeached that it was deprived of all probative value or that the jury could not believe it, or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury’s determination.” *Lemmon*, 456 Mich at 645-646 (internal quotation marks and citation omitted).

The victim testified that defendant made him perform fellatio on defendant three times and that defendant rubbed his bare chest. Although there were some inconsistencies in the victim’s testimony, the victim and his brother testified fairly consistently about one incident. Specifically, both the boys testified that while they were watching movies with defendant in the living room, defendant suddenly asked the victim to “suck his dick” and told the victim’s brother to turn around. When the victim did not comply with defendant’s request, defendant slapped him. The victim then complied and his brother could hear noises behind him. His brother became ill and threw up. Further, the brother testified that he eventually fell asleep in the living room and the victim testified that another act of fellatio occurred while his brother was sleeping. Although there were some inconsistencies in the boys’ testimony, especially with regard to the third act of fellatio<sup>1</sup> and to who was where and doing what when their mother and older brother arrived the next morning, their testimony was not impeached to the extent that it was deprived of all probative value, and the events described were not contrary to undisputed facts and did not defy physical realities. Therefore, the issue of witness credibility was properly left to the jury. Defendant has not established plain error warranting a new trial.

Next, defendant argues that he is entitled to a new trial because his counsel was ineffective for failing to object when the victim’s mother testified to a hearsay statement made by the victim concerning the charged sexual conduct. Defendant argues that the prosecutor failed to establish a proper foundation to admit the statement under MRE 803A.<sup>2</sup> Because defendant did not raise this issue in a motion for a new trial or request for an evidentiary hearing, our review is limited to errors apparent from the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish a claim of ineffective assistance of counsel, a defendant must show that

(1) his trial counsel’s performance fell below an objective standard of reasonableness under the prevailing professional norms and (2) there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different. Counsel is presumed to have provided effective assistance, and the defendant must overcome a strong presumption that counsel’s assistance was sound trial strategy. [*People v Horn*, 279 Mich App 31, 37-38 n 2; 755 NW2d 212 (2008) (internal citations omitted).]

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<sup>1</sup> Defendant was acquitted of a third count of CSC I.

<sup>2</sup> Defendant also contends that defense counsel should have objected when the victim’s brother offered the same testimony. However, a review of the record shows that defense counsel, not the prosecutor, elicited the hearsay statement from the victim’s brother.

The decision whether to object to evidence is a matter of trial strategy, and “this Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel’s competence with the benefit of hindsight.” *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). The failure to object to evidence can constitute ineffective assistance of counsel where the evidence was inadmissible and its introduction was so prejudicial that it could have affected the outcome of the case. *People v Ullah*, 216 Mich App 669, 685-686; 550 NW2d 568 (1996).

Defense counsel did not object when the victim’s mother testified on direct examination that the victim “said daddy made me suck his dick.” This testimony was offered under MRE 803A, which provides, in pertinent part:

A statement describing an incident that included a sexual act performed with or on the declarant by the defendant . . . is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:

- (1) the declarant was under the age of ten when the statement was made;
- (2) the statement is shown to have been spontaneous and without indication of manufacture;
- (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
- (4) the statement is introduced through the testimony of someone other than the declarant.

Defendant argues that the second and third elements were not established in this case. We disagree. Although the victim made the statement in response to a question, statements made in response to “open-ended questions” that suggest nothing about sexual abuse can be spontaneous. *People v Dunham*, 220 Mich App 268, 272; 559 NW2d 360 (1996). In this case, the victim’s mother testified that the victim’s brother appeared dirty and upset and she asked him what was wrong. When he did not respond, she asked the victim the same question. Because the question did not suggest that defendant had done anything inappropriate and because the victim’s mother was seeking information about what was bothering the victim’s brother rather than what, if anything, may have happened to the victim, the statement could qualify as having been spontaneously made even though it was prompted by a question. Further, the victim’s delay in reporting the abuse was excusable because he remained in defendant’s apartment after the incidents. He did not have an opportunity to disclose the abuse to a responsible adult until his mother came to pick him up and he told her as soon as he had left defendant’s apartment. Because defendant has not established that the evidence in question was inadmissible, his claim of ineffective assistance of counsel must fail. Counsel is not ineffective for failing to raise a meritless objection. *Matuszak*, 263 Mich App at 60.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Peter D. O'Connell  
/s/ Kurtis T. Wilder